

aforsaid was only put in during re-examination and were not properly identified, he, the Magistrate, was not obliged to treat this as admissible evidence which he had to consider.

So he went on to hold that the plaintiff had failed to discharge the burden of proof upon her.

With respect to the learned Magistrate, Section 138(3) of the Evidence Act 1950 Revised Act 56-71 states that, "If new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

In this case there was no cross-examination. Therefore it follows that there should have been no re-examination. But in this case further evidence was permitted to be put in by the plaintiff in the shape of exhibits P1 to P4. Since they were admitted as evidence the learned Magistrate was obliged to consider the effect of these documents on the plaintiff's claim.

What happened in reality was not a re-examination but an extension of the examination-in-chief and this of course is permitted by section 138(4) of the Evidence Act.

Having got that far, the learned Magistrate should have given the defendant opportunity to cross-examine the plaintiff upon this additional material.

The record does not indicate that the defendant was given such opportunity.

In all the circumstances I am of the view that the needs of Justice will be met if this case is remitted for a re-trial.

Had the matter been a lengthy one I would have directed the Magistrate to continue with the hearing and after furnishing the defendant with the opportunity to cross-examine, to address his mind to the effect of the documentary evidence on the action.

However the facts of this case are simple and the evidence is quite short. The parties should not be prejudiced by a re-trial and I accordingly order.

In my discretion I also order that each party

A will bear his own costs both here and in the court below in so far as it relates to the previous hearing.

Re-trial ordered.

Solicitors: *Pritam Singh & Co.; Tan Lip Yip & Co.*

KEE LIK TIAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Edgar Joseph Jr. J.) December 15, 1983]
[Ipoh – Perak Criminal Appeal No. 82 of 1983]

Criminal Law & Procedure – Summary trial – Application to have witness examined by psychiatrists – Competence to testify – Application to cross-examine witness.

Evidence – Child witness mentally retarded – Competence to testify – Whether witness should be affirmed or just warned to speak the truth – Hearsay evidence – Evidence Act, 1950, ss. 32, 33, 45 & 118 – Oaths and Affirmations Act, 1949, s. 8.

E In this case the appellant had been convicted of the offence of rape on a girl aged 12½ years. The learned President of the Sessions Court who tried the case found the girl to be mentally retarded or otherwise having a very low I.Q. but he held that she was a reliable and credible witness. Applications were made during the trial for the girl to be sent to a psychiatrist and also to have her cross-examined on her report but these were refused. The appellant appealed.

F Held, (1) in the circumstances of this case, the learned President should have determined the competence of the witness to testify and he should have done this with the aid of expert medical opinion;

G (2) if the witness was found competent to testify the President should then have determined whether she should be affirmed or just warned to speak the truth;

(3) in this case the reasons advanced by the defence for the recall of the witness for further cross-examination were sufficient to justify the making of an order for recall;

H (4) the refusal of the applications in this case prevented the appellant from exercising a statutory right and therefore the appeal should be allowed and an order made for the appellant to be re-tried before another President.

Cases referred to:

- (1) *Myers v. Director of Public Prosecutions* [1965] A.C. 1001.
- (2) *A. v. Lal Sahai* (1889) 11 All 183.
- (3) *R. v. Shara* (1891) 16 Bom. 359, 364.
- (4) *Ah Phut v. King* A.I.R. 1939 Rang. 402.
- (5) *Jalwanti Lodhin v. State* A.I.R. 1953 Pat. 246.
- (6) *Krishna Kahar v. Emperor* A.I.R. 1940 Cal. 182
- (7) *Ng Kwee Piow v. Regina* [1960] M.L.J. 278, 279.
- (8) *R. v. Hayes* [1977] 1 W.L.R. 234.

- (9) *R. v. Campbell* [1983] Crim. L.R. 174.
 (10) *Rameshwar v. State of Rajasthan* A.I.R. 1952 S.C. 54.
 (11) *Public Prosecutor v. Yap Kok Meng* [1974] 1 M.L.J. 108.
 (12) *Paramasivam v. Public Prosecutor* [1970] 2 M.L.J. 106.
 (13) *R. v. Sussex Justices* [1924] 1 K.B. 256, 259.

CRIMINAL APPEAL.

Gurbachan Singh for the appellant.

Miss Tee Hong Geok (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This Appellant, a fisherman, aged 49, was prosecuted in the Sessions Court at Ipoh upon a charge that he did on November 23, 1979 at 2.30 p.m. at Kebun Kelapa, Hutan Melintang, State of Perak, commit rape on a girl aged 12½ years in contravention of section 376 of the Penal Code. He was sentenced to four years' imprisonment. Against this conviction he has appealed and there is also a cross-appeal by the Public Prosecutor alleging inadequacy of sentence.

The facts are set out in the Grounds of Decision of the learned President and it is unnecessary to refer to them at any length. It is sufficient to say that according to the prosecution the Appellant went to the playground of the girl's school, on the date and at the time alleged in the charge, found her playing there and persuaded her to follow him to an oil palm plantation nearby where he had sexual intercourse with her. An independent witness who lived near the school, namely, Khozimah bt. Haji Mahadi (P.W. 4), testified that she saw the Appellant approach the girl and take her to the oil palm plantation.

Upon returning home, the girl was said to be in a pale and frightened state. She was also seen by her mother (P.W. 5) to change her underwear which was stained with a whitish substance. The mother then questioned her as to this and receiving no response proceeded to beat her more than once before the girl replied saying that she had been taken from the school to the oil palm plantation by the Appellant, known to her as Mun Kya, he being a family friend, and who there committed on her the act of rape.

A On the same day, the mother verified the girl's complaint by speaking to P.W. 4 who confirmed what she saw. Having got this confirmation, P.W. 5 then decided to await her son's return from a fishing trip. Three days later, the son returned and was duly informed of what had transpired. All three of them then went and consulted with a relative, described as the girl's aunt, namely, Goh Kowe Kee (P.W. 6), who lived nearby. Having taken advice from P.W. 6 the same day, all four repaired to the Hutang Melintang police station where the girl claimed that she made a report, being Exhibit P2, through the interpretation of P.W. 6.

D The Appellant was arrested on December 6, 1979 and charged with rape. His defence was an alibi. He claimed that at the material time he was at home engaged in constructing a fence around his house. He said he was assisted by one Kee Meng Tee who was interviewed by the police but who had died before the trial. The defence sought to introduce a statement recorded by the police from this witness which went to support the Appellant's alibi, relying on sections 32 and 33 of the Evidence Act, but the request to do so was refused by the learned President, in my opinion, quite correctly, since none of the requirements therein were capable of compliance. I might add that the categories of exceptions to the hearsay rule are now closed and it is therefore too late for Judges to intervene in the matter, though, of course, Parliament may do so: see *Myers v. Director of Public Prosecutions*⁽¹⁾.

G The Appellant then called his wife (D.W. 3) and another witness, Noor Rashid (D.W. 2), as witnesses and they confirmed his version.

H Upon these facts the learned President found P.W. 3 to be a reliable and credible witness whose testimony was corroborated by the evidence of P.W. 4, the injuries found by the doctor (P.W. 1) on P.W. 3, including evidence of penetration, white matter found by the mother on P.W. 3's underwear a short while after the alleged rape, and P.W. 3's complaint to her that it was the accused who had sex with her.

I On the other hand, he found the Appellant's story "most difficult to believe" for he did not live far from the school and was no stranger to P.W. 4 and P.W. 3's family for there to be any doubt as to identity. He rejected the defence version that the case against the Appellant had

been framed. He found improbabilities in the evidence of D.W. 2 who in any case did not appear to him to be a witness of truth. As for the Appellant's wife (D.W. 3) he "could not expect her to say otherwise with her husband's freedom at stake." He then proceeded to find the Appellant guilty, to enter a conviction and to sentence him to four years' imprisonment.

Upon these facts, and had there been no misdirection, I do not consider that sitting as an Appellate Court I would be disposed to interfere.

Before me, however, the conviction has been attacked on a number of grounds but, in the view I take of one of these, I do not consider it necessary to deal with the rest.

It was contended, in effect, that the Appellant was denied the substance of a fair trial in that the learned President had refused two applications by the defence to have P.W. 3 (who the learned President found to be "mentally retarded or otherwise have a very low I.Q.") to be examined by a Government psychiatrist, in order to determine her competence to testify in accordance with section 118 of the Evidence Act and two further applications to have P.W. 3 recalled for further cross-examination.

The initial application by the defence to have P.W. 3 examined by a psychiatrist was refused because, in the words of the learned President appearing in his notes of proceedings, the "witness appears to understand the proceedings and the questions put to her." A second application (made after the court ruled that there was a case to answer) to have P.W. 3 examined by a psychiatrist from Hospital Bahagia was also refused (42 C, D).

In his Grounds of Decision the learned President dealt with this aspect of the case and, by way of amplification, said:

"At the end of her (P.W. 3) testimony I turned down counsel's application as I was satisfied that she could understand the proceedings well. She understood the questions put to her and gave reasonable answers considering her age and the nature of the case. She might appear to be a bit slow mentally, simple and perhaps dull but I had no doubt that she knew what she was saying. In fact I found her to be a very credible witness. It was raised that P.W. 3 was coached by her aunt (P.W. 6) as such her evidence is unreliable. P.W. 3 herself admitted that P.W. 6 told her to say that the accused pulled her to the estate and there had sex with her. And in the course of her testimony P.W. 3 kept repeating this fact. While not discounting the fact that P.W. 3 might

A have been coached to some extent taking her evidence as a whole I did not accept that such coaching was to such extent as to make P.W. 3's evidence wholly unreliable. Whatever coaching was done appeared to me to be limited to the words repeated by the witness several times i.e. that the accused pulled her to the estate and there had sex with her."

B As to the defence application to recall P.W. 3 for further cross-examination in view of the court's refusal to have her examined by a psychiatrist, the learned President, in his notes of proceedings, observed:

C "I can see no justification for allowing further cross-examination now. Defence had all the opportunity to question and had done so at length already. Application refused."

A second application by the defence to have D P.W. 3 recalled for further cross-examination on her report, P2, which was tendered through P.W. 7 and not P.W. 3, was refused by the learned President, who in his notes of proceedings observed:

E "Report admittedly available to Defendant at commencement of the case and for cross-examination of P.W. 3. No justification for allowing further cross-examination now."

In my view, although the grant or refusal of applications such as were made was a matter of discretion it goes without saying that such discretion had to be exercised judicially. In refusing these applications the learned President appears to me to have adopted a Nelsonian approach in that he merely considered the prosecution's point of view. The reasons put forward by the defence were cogent and convincing and do not appear to have been taken into account or, alternatively, were not given proper weight. The learned President had himself found the girl to be "mentally retarded" and did not discount the fact that she might have been coached regarding the allegation that the Appellant had pulled her to the estate and there had sex with her which, after all, was the heart and core of the charge.

In these circumstances, the first question the learned President should have determined was the competence of the witness to testify for purposes of section 118 of the Evidence Act 1950: *A. v. Lal Sahai*⁽²⁾; *R. v. Shava*⁽³⁾, and this, having regard to the circumstances, he should have done with the aid of expert medical opinion which would have been admissible under the provisions of section 45(1) of the Evidence Act. To be eligible to testify the witness must be able to understand the questions put and to give rational an-

swers to them: *Ah Phut v. King*⁽⁴⁾; *Jalwanti Lodhin v. State*⁽⁵⁾.

Although it is not essential for the Trial Court to make a record of such satisfaction (*Krishna Kahar v. Emperor*⁽⁶⁾), it is desirable for it to do so as this would assist the Appellate Court. Had this procedure been followed and the learned President found as a result that P.W. 3 was incompetent, then she would have been rejected as a witness.

If, on the other hand, the witness was found to be competent to testify, then, the second question to be determined was whether she should be affirmed or just warned to speak the truth. This was necessary since, on the learned President's own finding, she was "mentally retarded" and thus a person of "immature age" within section 8 of the Oaths and Affirmations Act, 1949: see *Ng Kwee Piow v. Regina*⁽⁷⁾. To determine this question the learned President would have had to be satisfied that the witness had a sufficient appreciation of the seriousness of the occasion and a realization that taking the oath involves something more than the duty to tell the truth in ordinary day-to-day life: *R. v. Hayes*⁽⁸⁾; *R. v. Campbell*⁽⁹⁾. If not so satisfied, then, the learned President should not have allowed the witness to give evidence on oath or affirmation but should, in the words of section 8 of the Oaths and Affirmations Act, 1949, have cautioned her to speak the truth, the whole truth and nothing but the truth. Furthermore, appropriate questions may also be necessary to ascertain whether the child "understands the duty of speaking the truth or not" and the Supreme Court of India has held that it is desirable that judges should record their opinions and reasons for so thinking, otherwise it may be necessary to reject the evidence altogether: *Rameshwar v. State of Rajasthan*⁽¹⁰⁾. It follows, therefore, that the learned President should have granted the defence applications to have P.W. 3 examined by a psychiatrist or medical officer from Hospital Bahagia. Similarly, I consider the reasons advanced by the defence for the recall of P.W. 3 for further cross-examination were sufficient to justify the making of an order for recall under section 118(4) of the Evidence Act.

The refusals aforesaid prevented the Appellant from exercising a statutory right and its effect might well have been to sever a vital artery of evidence thus offending the elementary ideas of the adversarial system of justice to which our

A courts subscribe. Illustrations of the application of this principle are to be found in the cases of *Public Prosecutor v. Yap Kok Meng*⁽¹¹⁾ and *Paramasivam v. Public Prosecutor*⁽¹²⁾.

B I must, in the circumstances, echo the classic and oft-quoted words of Lord Hewart in *Rex v. Sussex Justices*⁽¹³⁾ that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

C In the result, as none of the steps adumbrated above was observed by the learned President, I must also, though with some regret, quash the conviction and set aside the sentence.

D That, however, is not the end of the matter. Although the charge relates to an offence alleged to have been committed a little more than four years ago, and the appellant had been in custody for three months and four days before he was admitted to bail, I have allowed this appeal because of misdirection by the learned President in refusing the defence applications aforesaid. What would have resulted had the defence applications been granted, as they undoubtedly should have, is a matter for speculation and can only be resolved at a re-trial before another President, which I hereby order. The Appellant is admitted to bail pending his re-trial on the same terms as in the Court below and will attend the Sessions Court, Ipoh, on Monday, December 19, 1983 at 9.00 a.m., when his case will be mentioned.

*Appeal allowed;
Re-trial ordered.*

Solicitors: *Bachan & Kartar.*

H PUBLIC PROSECUTOR v. LIM YOO HOCK

[A.Cr. J. (Edgar Joseph Jr. J.) February 22, 1984]
[Ipoh – Perak Criminal Appeal No. 214 of 1983]

I *Criminal Law and Procedure – Charge – Defective charge – Qualified plea of guilty – Films (Censorship) Act, 1952, s. 15 – Revision – Criminal Procedure Code, s. 305.*

In this case the respondent had been convicted on a charge alleging that he was found in possession of videotapes. The respondent was fined \$2,000 or in default 4 months' imprisonment. The Public Prosecutor appealed against the sentence.